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Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-720

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

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CLEAR PINE MOULDINGS, INC.,
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL NO. 3-200, AFL-CIO,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF IN OPPOSITION OF INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL NO. 3-200, AFL-CIO

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## QUESTIONS PRESENTED

1. Must a court, on cross-applications for review and for enforcement of an order of the National Labor Relations Board, deny enforcement of a Board order insofar as it is repudiated by the Board while the enforcement proceeding is pending?

2. Did the Board exceed its remedial discretion when it awarded back pay to unlawfully unreinstated unfair labor practice strikers who registered with the state employment service but made no other effort to find interim employment for periods varying from one to two months?

3. Did the Board err in awarding back pay to individuals who did not testify at a back pay proceeding although the employer did not plead the affirmative defense of willful loss of earnings?

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International Woodworkers of America, Local No. 3-200, AFL-CIO [1] respectfully requests that the Court deny the Petition for Writ of Certiorari. I.W.A., Local No. 3-

[1] International Woodworkers of America, Local No. 3-200 is referred to herein as I.W.A., Local No. 3-200 or as the Union.

200 was the charging party before the National Labor Relations Board and intervened in the review proceeding before the Court of Appeals. The Union is therefore a party by virtue of Rule 10.4 of this Court.

## OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). The memorandum opinion of the Court of Appeals for the Ninth Circuit has not been reported by order of the court. It is reproduced in Appendix A to the Petition.

## STATEMENT OF THE CASE

The agency order challenged by Petitioner issued, after hearing, when the N.L.R.B. and Clear Pine were unable to agree on the amount of back pay due unfair labor practice strikers who had been unlawfully denied immediate reinstatement when they offered to return to work.

The Union had terminated a three-month strike and unconditionally offered, on behalf of Clear Pine employees, to return to work on November 28, 1977. The Company had not immediately reinstated them. Most, however, had been reinstated between December 31, 1977 and March 31, 1978.[2]

On September 12, 1978, the Board issued a decision and order finding that the Company had committed various unfair labor practices which had caused the employees to engage in the 1977 strike and that the employees were unfair labor practice strikers. *Clear Pine Mouldings, Inc.*, 238 N.L.R.B. 69, 77-80 (1978). The Board's order required the Company to offer immediate and full reinstatement to the strikers and to make them whole for losses caused by the Company's failure to reinstate them. *Id.*, 238 N.L.R.B. at 81. The Court of Appeals enforced the

[2] Appendix A to the Petition at 2a.

Board's order and this Court denied certiorari. *Clear Pine Mouldings, Inc. v. N.L.R.B.*, 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

Clear Pine and the Regional Director of the N.L.R.B. were unable to agree on the amount of back pay due. Accordingly, on August 31, 1981, the Regional Director issued a back pay specification detailing his computation of back pay and interim earnings for each striker for each calendar quarter until he was reinstated to his former job. GCX 1(c), appendix A-PPP.[3] The Company filed an answer generally denying that any back pay was due. GCX 1(e). On December 4, 1981 the Company filed an amended answer again generally denying any liability but also stating facts and articulating defenses with respect to certain strikers. The Company did not allege that any employee failed to seek interim employment or otherwise suffered a willful loss of earnings. GCX 1(i). On January 14, 1982, the Regional Director issued an amended back pay specification. GCX 1(j). The Company's answer to the amended specification again failed to raise a defense of willful loss of earnings. GCX 1(l).

With the pleadings in that condition, the back pay hearing opened July 13, 1982 before an administrative law judge. At no time during the hearing did counsel for Clear Pine ask leave to amend his pleadings to allege willful loss of earnings, request the assistance of counsel for the General Counsel of the N.L.R.B. in locating back pay claimants or claim that counsel had failed to cooperate with him in that regard. On the second day of the

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[3] References, except to the orders of the N.L.R.B. and the court below which are reproduced in the Appendixes to the Petition, are to the Record before the Court of Appeals. "Tr." refers to the stenographic transcript of the supplemental hearing before the administrative law judge. "GCX", "RX" and "UX" refer to exhibits introduced at the hearing by the General Counsel, the Company and the Union respectively.

hearing, however, he indicated he "would like" to amend to allege that claimants were willfully idle but that, "I would have to say that as to certain of the claimants that would not be true." Tr. 347-348. He never, prior to briefing, identified the claimants he contended had been willfully idle.

Notwithstanding his failure to plead, counsel for the Company asked certain of the General Counsel's witnesses questions concerning their efforts to seek interim employment and called a number of claimants, himself, to answer questions on that subject. Fourteen of the claimants who testified stated that they sought interim work by registering at the state employment agency but made no further effort to find work. Each of those employees returned to work at Clear Pine within two months of the end of the strike (November 28, 1977), most during the week following New Year's Day.[4]

Twenty-seven claimants did not testify at the hearing. Counsel for the General Counsel informed the administrative law judge that five of those were unavailable to testify. The remaining claimants, while available, were called by none of the parties.

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[4] Alonzo Hare returned Jan. 3 or 4, 1978 (GCX 1(e) at 3-4, GCX 1(c), V-2); Thomas Tugman returned Jan. 4, 1978 (GCX 1(e) at 3-4, GCX 1(C), GGG-2); Faye Jordan returned Jan. 4, 1978 (GCX 1(e) at 3-4, GCX 1(c), CC-2, Tr. 364); Daniel York returned Jan. 4 or 6, 1978 (GCX 1(e) at 3-4, GCX 1(c), MMM-2 Tr. 356); Winnie Koutsouris returned Jan. 5 or 6, 1978 (GCX 1(e) at 3-4, GCX 1(c), HH-2, Tr. 497); Colleen Maw returned Jan. 5 or 6, 1978 (GCX 1(e) at 3-4, GCX 1(c), JJ-2, Tr. 497); Art Morton returned Jan. 5, 1978 (GCX 1(e) at 3-4); Darlene Forseth returned Jan. 5, 1978 (GCX 1(e) at 3-4, Tr. 804); William R. Carter returned Jan. 5, 1978 (GCX 1(e) at 3-4, GCX 1(c), E-1); Peter Koutsouris returned Jan. 6, 1978 (GCX 1(e) at 3-4); Allen Dendy returned Jan. 10, 1978 (GCX 1(e) at 3-4); Tom Ferguson returned Jan. 17 or 22, 1978 (GCX 1(e) at 3-4, Tr. 913); David Dunn returned Jan. 17, 1978 (GCX 1(e) at 3-4); Debbie Miller returned Jan. 26, 1978 (GCX 1(e) at 3-4, GCX 2(c), 00-2).

The Company presented general evidence that substantial hiring was done by area wood products employers during the back pay period. There was no evidence that any of the 27 non-testifying claimants was offered employment but refused it. The Company contended, based on this general testimony and the lack of substantial interim earnings, that the Board should conclude that those who failed to testify willfully lost earnings and should be denied back pay.[5]

The Board, adopting the recommendation of its administrative law judge, held that the Company had failed to establish that any claimant had incurred a willful loss of earnings. Nevertheless, the Board ordered that the gross back pay due the five claimants who were unavailable to testify should be held in escrow until such time as they could be located and the Company given an opportunity to question them.[6] The order issued February 22, 1984.

The Employer petitioned for review of the order to the Court of Appeals for the Ninth Circuit. The Board cross-petitioned for enforcement and filed the Record.

Three months thereafter the Board moved the Court to remand to "reconsider certain issues raised regarding the amounts of backpay due under the Board's order." When the Union opposed the remand request, the Board clarified that it "wishes to reconsider only that portion of its decision which addresses the adequacy of certain discriminatees' efforts to mitigate backpay by seeking interim employment." The Board at no time indicated that it intended to reopen the hearing. Rather, it simply wished to reassess the evidence on the existing record. The motion was denied.

The Board in its brief and at oral argument persevered in its remand request but, alternatively, sought enforcement of its order except insofar as back pay was awarded

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[5] Appendix C to Petition at 126a.

[6] Appendix C to Petition at 144a.

the fourteen who testified that their efforts to mitigate back pay consisted solely of registration for work.

The Court of Appeals denied the remand request saying, "The record as developed is sufficient for a back pay determination and the Board's decision adequately resolved the issues presented to it." [7] It enforced the N.L.R.B. order, finding that Clear Pine had not carried its burden to prove failure to mitigate. The Court held, with respect to the 14 whose efforts to mitigate were limited to registering for work,

> "The Board found that the employees were returning to work rapidly and each of them could have reasonably expected to be back at Clear Pine on short notice. The Board in the past has also permitted victims of unfair labor practices an adjustment period roughly equal in duration to the period here. * * * The employees did not need to make, under the circumstances, a more diligent search for work." [8]

The court also rejected Clear Pine's contention that a claimant cannot be awarded back pay if he has not testified, holding that the employer carries the burden not only of proof but also of production of witnesses unless the employer makes a "specific demand before the A.L.J. hearing." [9]

The Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing en banc.

## REASONS FOR DENYING THE WRIT

The Employer petitions this Court to absolve it of back pay liability to 41 employees to whom it discriminatorily denied reinstatement. The Employer wishes to be freed

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[7] Appendix A to the Petition at 5a.

[8] Appendix A to the Petition at 6a-7a.

[9] Appendix A to the Petition at 7a.

of this liability to 27 of the employees because counsel for the General Counsel of the National Labor Relations Board did not call the employees for questioning concerning their efforts to find interim work. Yet the General Counsel did not call them because the Employer failed to put the parties on notice of its intent to raise the defense of failure to mitigate by pleading it. The Employer seeks to paper over this defect in his case by proposing a novel legal rule—that the N.L.R.B. may not award back pay to claimants unless they testify notwithstanding the Employer's failure to plead any defense to the claim set forth in the back pay specification. The Board has established adequate procedures for ascertainment of back pay entitlement. There is no need to impose new procedures which, in effect, place the burden of proof as to unpled defensive matters on the General Counsel.

The Employer also wishes to eliminate its liability to 14 other employees who the Board concluded had made adequate efforts to find interim work during very brief periods of unemployment. In this respect the case is but a routine application of the general back pay principles articulated in *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941). The application of those rules by the Court of Appeals should not be disturbed.

**I. The Court of Appeals applied well established principles in enforcing the award as to registrants for work.**

More than forty years ago, in *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941), this Court held that the remedial provisions of the National Labor Relations Act, 29 U.S.C. § 160(c), must be exercised to effectuate the policies of the Act. To that end the Court held that the Board could not exclude employer evidence of willful losses or other matters in mitigation of back pay liability. *Id.*, 313 U.S. at 197-198. The Court did not announce any formula by which back pay entitlement should be calculated in a particular case. It simply ruled that the

Board "may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment." *Id.*, 313 U.S. at 199-200.

The Board and the courts of appeal have developed standards for assessing employee efforts to mitigate. There is no conflict among the courts of appeal with regard to these standards. All have recognized that efforts to mitigate should be assessed over the entire back pay period and that victims of discrimination are entitled to a "grace period" following the discriminatory act before they are expected to take any steps to find interim work. *See e.g., N.L.R.B. v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103 (7th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Saginaw Aggregates, Inc. v. N.L.R.B.*, 482 F.2d 946 (6th Cir. 1973).

Contrary to the Petitioner's claim, no court of appeals has ruled that an employee who makes no effort to find work except by registering with a state agency has failed to mitigate damages without regard to other facts including the duration of his unemployment. Rather, the courts of appeal have considered a host of facts and circumstances in assessing employee diligence in seeking work. Some of these are length of unemployment, reasonableness of belief that reinstatement is imminent, availability of work in the area for which the employee is qualified, number of applications for work and registration for work with the state.

The cases cited in the Petition for the proposition that registration for work is not alone sufficient to mitigate say no more than that a particular employee, under a particular constellation of facts, did not diligently seek work. Indeed one of the cases cited, *N.L.R.B. v. Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014 (9th Cir. 1979), was decided by the same circuit that rejected the suggestion for rehearing en banc in this case. There is no conflict in doctrine.

The Court of Appeals applied the accepted principles in light of the Record as a whole and concluded that the Board's finding that the Employer had not proved failure to mitigate was supported by substantial evidence. There is no uncertainty in the law which warrants disturbing the ruling.

The Court of Appeals was not required to deny enforcement of the award because the National Labor Relations Board, after petitioning for its enforcement, repudiated it. The National Labor Relations Act provides that the agency loses its power to modify its findings and order when the Record is filed upon petition for review or for enforcement with a court of appeals. 29 U.S.C. § 160(d) and (e). While the Court of Appeals had the authority to remand this case for reconsideration by the Board, it was not required to do so.

This Court has recognized the responsibility of the Board to make findings of fact, conclusions of law and an appropriate remedial order in the first instance. It does not follow that a reviewing court must ignore those findings, conclusions and order when an attorney for the Board announces to a reviewing court that the Board has had second thoughts. Subsections 10(d), (e) and (f) authorize the court to disregard those second thoughts; maintain jurisdiction; and, in the interest of finality, enforce the order if it is supported by substantial evidence in the Record. The Company has adverted to no case holding that a reviewing court may not exercise this discretion.

**II. No court of appeals has required the Board's General Counsel to produce all claimants as a condition to award of back pay.**

The Petition urges the Court to grant certiorari to resolve a conflict among the circuits concerning the burden to produce testimony from back pay claimants. There is no conflict in the circuits; and, if there were, the

Court should not resolve it in this case because the case can be disposed of on other grounds.

The Court of Appeals rejected Clear Pine's argument that claimants not called to testify should not have been awarded back pay. The Court reasoned that it is the employer's burden to produce testimony to support a defense of failure to search for interim employment and held that any duty the General Counsel may have to produce claimants to testify must be triggered by "the employer's specific demand" prior to the back pay hearing.[10] Having failed to make such demand, said the Court, the employer cannot complain of the absence of claimant testimony.

Two courts of appeal have refused to enforce back pay awards to employees who the General Counsel has not called to testify. In each case the respondent employer had pled the defense of willful loss of earnings and the General Counsel had nevertheless failed to produce claimants to testify. *N.L.R.B. v. Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966); *N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). Both courts, like the Ninth Circuit, adhered to the view that the burden to plead and prove failure to mitigate rests squarely with the respondent, not the General Counsel. They simply concluded that when the respondent raises specific mitigation issues in its pleadings the General Counsel, to whom evidence on such issues is more available, is required to cooperate to the extent of making witnesses available to testify at the hearing. Neither court has required that claimants testify in the absence of prior notice that respondent will argue that claimants willfully lost earnings. The

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[10] The Court, speaking of a "demand", apparently referred to the N.L.R.B.'s internal guidelines which require the General Counsel to cooperate with a respondent who seeks assistance in procuring attendance of witnesses at a backpay hearing. N.L.R.B. Case-handling Manual (Part Three—Compliance Proceedings), Section 10733.

Second Circuit warned that its holding should not be misinterpreted:

> "We wish to make clear what we are not deciding when we conclude that the Board should produce the discriminatees to testify. *We do not mean that the employer need no longer raise this defense in his answer . . .*"

*N.L.R.B. v. Mastro Plastics Corp., supra,* 354 F.2d at 178 (emphasis added).

The D.C. Circuit concurred. *N.L.R.B. v. Rice Lake Creamery Co., supra,* 365 F.2d at 892. Consequently, when an employer who had failed to plead willful loss of earnings challenged a back pay award because the General Counsel had not produced claimants to testify the D.C. Circuit enforced the award. *Southland Manufacturing Corp. v. N.L.R.B.,* 475 F.2d 414 (D.C. Cir.), *cert. denied,* 414 U.S. 858 (1973). The court observed that the answer to the back pay specification had generally denied the accuracy of the interim earnings portion of the specification but had not even mentioned willful loss of earnings. Thus, the court held that the Board had no burden to produce witnesses.

The rule articulated by these courts would not produce a result different from that reached by the Ninth Circuit in this case. Under the *Mastro Plastics/Rice Creamery* rule the General Counsel has no duty to produce claimants unless the employer has first put the General Counsel on notice that it contends the claimants have incurred a willful loss of earnings by so pleading in its answer. Clear Pine concededly did not plead willful loss of earnings in its answer. And, contrary to the assertion in the Petition at 35, footnote 10, the Company did not move to amend its answer during the hearing to allege that defense and the administrative law judge did not grant such a motion. Rather, the administrative law judge overruled a motion to exclude evidence offered by the

employer on the willful idleness issue because the defense had not been pled. Tr. 348, l. 17-22. In any event, the Court of Appeals correctly refused to fault the General Counsel for not producing witnesses it had no way of knowing, prior to the hearing, could offer evidence material to any disputed issue of fact.

The Court's disposition of this case is not in conflict with the law of the District of Columbia or of the Second Circuit.

## CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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